

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 19, 2015

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: David C. Reymann, from the Defamation subcommittee

Excused: Gary L. Johnson, Peter W. Summerill

1. *Minutes.* On motion of Mr. Fowler, seconded by Judge Stone, the minutes of the September 14, 2015 meeting were approved.

2. *Defamation Instructions.* The committee continued its review of the defamation instructions.

a. *CV1604. Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff Is Reasonable.* Mr. Reymann explained that legal standards in defamation cases vary depending on the status of the plaintiff and the subject of the allegedly defamatory statement, as set out more fully in the committee note to CV1604. Instructions CV1604-08 present the different possibilities. Ordinarily, only one of the instructions would be given in a case, unless the case involved different statements each of which was claimed to be defamatory and which involved different standards. CV1604 deals with a plaintiff who is a public figure or public official where the connection between the statement and the plaintiff is reasonable. The committee added a sentence to the end of the fourth paragraph of the committee note saying, “In the unusual case where different standards apply to different statements, the court will have to instruct as to the specific statements.”

Dr. Di Paolo joined the meeting.

Ms. Blanch suggested breaking out the separate elements in the third paragraph into separate subparagraphs, (1) and (2). Mr. Ferre asked whether the “intentionally blind” standard came from the case law. Mr. Reymann explained that the language is not used in the cases, but that a “reckless disregard” standard would not be appropriate for situations where the defendant was not in fact aware of facts or circumstances that would cause someone to reasonably understand that the statement referred to the plaintiff. Reckless disregard implies a negligence standard, which is not constitutionally permissible in the case of public figures or officials. At Ms. Kuendig’s suggestion, CV1604 was revised to read:

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more of the recipients of the statement actually understood the statement to be referring to [name of plaintiff] and either:

1. [name of defendant] intended the statement to refer to [name of plaintiff], or
2. [name of defendant] knew or was intentionally blind to the facts or circumstances that would cause the recipient to reasonably understand the statement as referring to [name of plaintiff].

On motion of Mr. Simmons, seconded by Ms. Blanch, the committee approved the instruction as modified.

b. *CV1605. Definition: About the Plaintiff – Private Plaintiff – Matter of Public Concern – Connection to Plaintiff Is Reasonable.* The committee revised CV1605 to track CV1604, except that it replaced the “knew or was intentionally blind” standard with “acted negligently in causing the recipient to reasonably understand the statement as referring to [name of plaintiff].” On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the instruction as revised.

c. *CV1606, Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff Is Reasonable – Negligence Required; and CV1607, Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff Is Reasonable – Strict Liability Allowed.* Mr. Reymann explained that CV1606 and CV1607 dealt with purely private cases, and no U.S. or Utah Supreme Court case has decided what level of fault is permissible in such cases. CV1606 is identical to CV1605 and applies a negligence standard. CV1607 provides for strict liability. Because they are alternative instructions treating the same situation, Ms. Blanch suggested making them 1606A and 1606B. Judge Stone suggested doing away with CV1606 and CV1607 and saying in the committee note to CV1605 that, if the case does not involve a matter of public concern (that is, if it is a purely private case), it is an open question as to whether the defendant can be strictly liable or whether the plaintiff has to prove negligence. If strict liability applies, then the court could omit subparagraph 2. He was reluctant to publish what amounts to a hypothetical jury instruction. Judge Harris, on the other hand, thought the only open issue was whether the proper instruction would be CV1606 or CV1607 and

that it would be more helpful to offer both alternatives. At Ms. Kuendig's suggestion, the second sentence of CV1607 was revised to read, "[Name of plaintiff] must prove that one or more of the recipients" The committee also deleted "Required" from the title of CV1606 and "Allowed" from the title of CV1607. On motion of Mr. Ferre, seconded by Mr. Simmons, the committee approved the instructions as revised.

d. *CV1608. Definition: About the Plaintiff – Connection to Plaintiff Is Unreasonable.* Mr. Reymann explained that, at common law, if the defendant did not intend a connection between the statement and the plaintiff and it would be unreasonable to draw such a connection, there was no liability. If the defendant did not intend the statement to refer to the plaintiff but the recipients understood it to refer to the plaintiff, their understanding must have been reasonable. Ms. Kuendig questioned whether it was proper to tell the jury that the court had found the connection unreasonable. Dr. Di Paolo suggested that it could prime the jury to find one way or the other and that reasonableness depends on the audience.

Mr. Ferre was excused.

The committee thought it was better not to tell the jury that the court had already determined that the connection was unreasonable. Dr. Di Paolo asked whether the instruction was even necessary or whether the issue could be covered in a committee note. Mr. Reymann noted that the instruction was necessary because intent is required. At Ms. Kuendig's suggestion, the instruction was revised to read:

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. To do so, [name of plaintiff] must prove that:

1. [name of defendant] intended the defamatory statement to refer to [name of plaintiff], and
2. one or more of the recipients of the statement actually understood the statement to be referring to [name of plaintiff].

Ms. Kuendig also suggested deleting "Connection to Plaintiff Is Unreasonable" from the title of the instruction. Judges Harris and Stone said that they do not leave the titles of the instructions in when they give them to the jury, but the committee noted that some other judges do.

At Judge Stone's suggestion, the committee renumbered instructions CV1604-08 as CV1604A-E. Ms. Kuendig suggested saying in the introductory instruction, CV1601, that only one of the five 1604 instructions will probably apply in a given case. Mr. Reymann noted that the cross-references to CV1604 in the committee notes need to be changed to CV1604A. Judge Stone thought that some of the notes could be consolidated. He noted that the court decides whether a given statement is a matter of public concern and whether any connection to the plaintiff is unreasonable. He suggested that the comments be modified to say which instruction goes with each type of statement.

Ms. Kuendig suggested adding an introductory instruction that says, "[Name of plaintiff] alleges that [name of defendant] made the following defamatory statements:" But Mr. Reymann pointed out that the parties often disagree about what exactly the statements at issue are.

On motion of Ms. Kuendig, seconded by Ms. Blanch, the committee approved instructions CV1604A-E.

e. *CV1609 [renumbered 1605]. Definition: False Statement of Fact.* Mr. Reymann said that the last sentence was from MUJI 1st. He did not know where MUJI 1st got the statement from and thought it could be left out. Dr. Di Paolo liked it and thought it was clear. But she was still concerned with "materially." She suggested replacing "materially false" with "a false statement of considerable importance." But it is not the subject of the statement that must be material but its truth or falsity. Judge Harris suggested "significantly false." Judge Stone thought "significantly" sounded quantitative. He suggested "false in a way that matters." Mr. Simmons suggested treating "materially false" like the committee treated "proximate cause," i.e., drop the modifier and say that in this context "false" (or "cause") has a particular meaning that the jury is required to use and then define "false" to comply with the definition of "materially false." Mr. Reymann expressed concern about departing from settled law. Ms. Blanch suggested giving an example, but Mr. Reymann said the subcommittee intentionally avoided giving examples, which could be misconstrued. The committee considered the order of the sentences in CV1609. Judge Harris suggested defining "false" before defining "materially false." Dr. Di Paolo questioned whether the instruction should say a "false statement of fact," since "fact" implies that it is true. She thought that using "fact" and "false" in the same sentence to refer to the same statement could confuse jurors. Mr. Reymann pointed out that the cases speak of statements "of fact" to distinguish them from statements of opinion, but also noted that a statement of opinion can be actionable if it implies facts. (The committee went back and modified subparagraph (1) of CV1602 accordingly.) Mr. Reymann approved of striking "of fact" from the title and second line. Judge Harris still thought the sentence from

MUJI 1st was problematic; he did not think it was legally accurate. Mr. Reymann noted that it is similar to an Illinois legal doctrine, but there is no Utah law to support it. The committee decided to delete the sentence. Dr. Di Paolo noted that “verified” implies that something is true; she wasn’t sure that something could be “verified as true or false.” Judge Stone questioned whether it added anything. Mr. Reymann explained that it was meant to exclude statements that cannot be verified, such as religious claims. Judge Harris suggested saying that if the statement is not verifiable, it cannot be defamatory. The committee again raised the question of whose burden it is to prove truth or falsity. Mr. Reymann noted that, at common law, it was the defendant’s burden to prove the statement was true, and that may still be the law on a purely private matter, but the case law lists falsity as an element the plaintiff must prove. Mr. Reymann and Judge Harris noted that there are three separate requirements: (1) there must be a statement that states or implies facts; (2) the facts must be capable of being proved true or false; and (3) the statement must be materially false. The committee proposed the following restatement of the instruction:

[Name of plaintiff] must prove the allegedly defamatory statement is a materially false statement that can be proved true or false. “False” means that the statement is either directly untrue or that it implies a fact that is untrue. A statement is “materially false” if it is false in a way that matters, that is, if it has more than minor or irrelevant inaccuracies.

“Truth” does not require that the statement be absolutely, totally, or literally true. The statement need only be substantially true, which means the gist of the statement is true. You should determine the truth or falsity of the statement according to the facts as they existed at the time [name of defendant] published the statement.

At Mr. Reymann’s request, a citation to *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), was added to the beginning of the references.

The committee deferred further discussion of CV1609 (now CV1605) until the next meeting.

3. *Next meeting.* The next meeting will be Monday, November 9, 2015, at 4:00 p.m.

The meeting concluded at 6:00 p.m.